Supreme Court, U.S.
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No. 94-1541

In The

Supreme Court of the United States

October Term, 1994

JOHN BEY, JAMES JOHNSON, AND E. E. VANBUSKIRK,
in their individual capacities,

Petitioners,

v.

KENNETH L. BISBEE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court is the appropriate forum to resolve factual disputes as to an employer's motive for discharging an employee?

PARTIES TO THE PROCEEDING

Petitioner John Bey is the Sheriff, Petitioner James Johnson is the Undersheriff, and Petitioner E. E. VanBuskirk was a Sergeant in the Converse County, Wyoming, Sheriff's Office.

Respondent Kenneth L. Bisbee is a former Deputy Sheriff with the Converse County Sheriff's Office.

Defendant Board of County Commissioners of Converse County was a party to a related cross-appeal in the United States Court of Appeals for the Tenth Circuit.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent Kenneth L. Bisbee respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, John Bey, James Johnson and E.E. VanBuskirk.

OPINIONS BELOW

The Tenth Circuit Court of Appeals affirmed the Wyoming District Court's denial of Petitioners' Motion

for Summary Judgment on grounds of qualified immunity. The Court of Appeals' Opinion is reported at 39 F.3d 1096 and is reproduced in the Appendix to the Petition For Writ Of Certiorari. (App. 1-14).

Following issuance of the Tenth Circuit's decision, Bey, Johnson and VanBuskirk petitioned for rehearing and suggested rehearing en banc. The Court of Appeals' Order denying Petitioners' request is reproduced in the Appendix to the Petition for Certiorari. (App. 15-16).

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

The jurisdiction of the Tenth Circuit Court of Appeals was invoked under 28 U.S.C. § 1291, pursuant to the collateral order doctrine which permits review of the trial court's denial of the defense of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985); *Workman v. Jordan*, 958 F.2d 332 (10th Cir. 1992).

The United States District Court for the District of Wyoming held original jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and 42 U.S.C. §§ 1983, 1985 and 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the statutory provision cited by Petitioners, this case involves the freedom of speech clause of the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

Bisbee's Exercise of Right of Free Expression.

On July 6, 1991, Respondent Deputy Sheriff Bisbee discovered evidence strongly indicating that his immediate supervisor, Petitioner Sergeant VanBuskirk, had falsified official, departmental records and had wrongfully converted to his own use a rifle, which had been found by a citizen. VanBuskirk's conduct, if proven, directly violated the Sheriff Department's operating policy. Bisbee compiled this information about VanBuskirk into a formal incident report.

Petitioners' Knowledge of Bisbee's Report of Official Misconduct.

Bisbee showed his report to the Sheriff Department dispatcher and gave a copy to the supervisor on duty, Sergeant Greg Way. Sergeant Way read the report and directed the dispatcher to assign a case number to it. The report's case number was then entered into the Department's computerized Daily Bulletin, with the identifying information "sensitive material, see [Petitioner Undersheriff Johnson] for details."

At Sergeant Way's direction, Bisbee sealed the original report in an envelope, which Way placed in the lower tier of a two-tier basket on Undersheriff Johnson's desk. Sergeant Way assured Bisbee that he would advise Petitioner Sheriff Bey that night of the findings in the report. As promised, Sergeant Way contacted Sheriff Bey that evening and told him that Bisbee had filed a report regarding the possible mishandling of found property.

The following morning Sheriff Bey read Bisbee's entry in the Daily Bulletin about the "sensitive material" in the hands of Undersheriff Johnson. According to Sheriff Bey, Way advised him at this time that the Bulletin entry referred to information that Bisbee had about disposed property. Sheriff Bey was sufficiently concerned about Bisbee's "sensitive material" that he directed Undersheriff Johnson to investigate the matter upon Johnson's return to work from vacation on July 10, 1991.

Bisbee, by this time, had discussed the report with Sheriff's Deputy Macormic and had given him a complete copy. By July 10, 1991, at least three members of the Sheriff's Department, in addition to Bisbee, had read Bisbee's entire report of VanBuskirk's wrongdoing. In fact, it was common knowledge and freely discussed among the Department employees that Bisbee had filed the incident report about VanBuskirk. "[E]verybody was talking about it. . . . the dispatchers were talking about it; the deputies were talking about it." (Deposition of Deputy Keith Lind). Nevertheless, the three Petitioners – top officials in the County's law enforcement and investigative agency – claim total ignorance of the report's contents.

Retaliatory Discharge.

In the midst of speculation about his conduct, VanBuskirk, on July 13, 1991, initiated a confrontation with Bisbee on Interstate Highway 25, where Bisbee and Deputy Macormic were operating radar to apprehend suspected drug dealers. VanBuskirk knew that Bisbee was there to provide back-up assistance to Deputy Lind, who

had organized the drug investigation. Nevertheless, VanBuskirk angrily approached Bisbee, berated him for participating in the drug investigation and ordered him to stop. VanBuskirk gave no similar order to Deputy Macormic or to Deputy Lind, who was stationed approximately one mile down the interstate. VanBuskirk accelerated the confrontation, suspended Bisbee from his duties, and directed Bisbee to get in VanBuskirk's vehicle. At that point, when Bisbee was under suspension and in fear of his personal safety, he directed a derogatory retort to VanBuskirk and refused to enter VanBuskirk's vehicle.

Two days later, on Monday, July 15, 1991, Petitioners Bey, Johnson and VanBuskirk agreed to terminate Bisbee's employment on the basis of VanBuskirk's uncorroborated allegations of insubordination. Bey, Johnson and VanBuskirk decided to dismiss Bisbee without talking to him or offering him any opportunity to respond, without any investigation, and without a hearing of any kind, either before or after the termination. No one contacted Deputy Macormic, the only eye witness to the confrontation other than Bisbee and VanBuskirk, until several days after agreeing to and approving of Bisbee's dismissal. Petitioners agreed to this summary dismissal of Bisbee, even though the Sheriff's Office Personnel Policies require a complete investigation of a contemplated termination and a hearing before the Board of County Commissioners.

It is undisputed that when Sheriff Bey, Undersheriff Johnson and Sergeant VanBuskirk met on July 15, 1991, and agreed to summarily remove Bisbee as Deputy Sheriff, they **knew** that Bisbee, on July 6, 1991, had filed Report 1404 containing sensitive material. Furthermore,

they knew that his report concerned the possible mishandling of found property. VanBuskirk, without question, knew that he had appropriated for his own use property found by a citizen in the Spring of 1991.

In accordance with United States Supreme Court Rule 15, Respondent advises the Court that the Petition For Writ Of Certiorari contains the following misstatements of fact:

(1) Sergeant Way did not divulge the information that Bisbee had assembled to any of the Petitioners. (Petition 8).

(2) No one ever told Sheriff Bey, Undersheriff Johnson or Sergeant VanBuskirk of Bisbee's report until *after* Bisbee's termination. (Petition 8).

In fact, Sheriff Bey himself and Sergeant Way testified that Way advised the Sheriff, within hours after the filing of the report, that Deputy Bisbee had filed a report concerning the possible mishandling of found property. Five (5) days *before* deciding to terminate Bisbee's employment, Sheriff Bey directed Undersheriff Johnson to investigate Report 1404, characterized in the Department's Daily Bulletin as "sensitive material." Petitioners' claims of complete ignorance of Bisbee's incident report at the time of his termination are not supported by the record.

SUMMARY OF THE ARGUMENT

Questions of material fact abound as to whether Sheriff Bey, Undersheriff Johnson and Sergeant VanBuskirk discharged Deputy Sheriff Bisbee in retaliation

for his reporting of serious misconduct by his supervisor. The Tenth Circuit Court of Appeals and the Wyoming District Court reserved these factual issues for trial, in accordance with United States Supreme Court authority.

REASONS FOR DENYING THE WRIT

I.

THE TENTH CIRCUIT DECISION RESERVES DISPUTES AS TO MOTIVE FOR THE JURY, CONSISTENT WITH *MCKENNON v. NASHVILLE BANNER PUBLISHING COMPANY.*

The Tenth Circuit Court of Appeals concluded that Deputy Bisbee put forth sufficient evidence to create a circumstantial case that he was fired in retaliation for exercising his First Amendment rights. (App. 8). Questions concerning motive and witness credibility, according to the Tenth Circuit, are reserved for the jury. (App. 8).

The Court of Appeals' holding, that the factfinder necessarily determines the employer's motives for discharge, comports with this Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995). In *McKennon*, this Court held that after-acquired evidence, which would have resulted in an employee's immediate discharge in any event, does not bar all relief for the employee's actual discharge solely in violation of the Age Discrimination in Employment Act. The later discovery of evidence, which indisputably would have led to the employee's termination on lawful grounds, limits the employee's remedies for her earlier discharge in violation

of the federal antidiscrimination law. This analysis as to damages, however, is premature when the employer's real reasons for ordering discharge have yet to be determined by the factfinder. *Id.* at 885.

Petitioners contend that Bisbee's alleged insubordinate conduct alone suffices to support termination, thereby preventing him from any relief for a wrongful termination. An employer's legitimate reason for discharge, however, will not suffice if that reason did not motivate the employment decision. *McKennon, supra,* 115 S. Ct. at 885, *citing Price Waterhouse v. Hopkins,* 490 U.S. 228, 252, 109 S. Ct. 1775, 1791, 104 L.Ed.2d 268 (1989) (plurality opinion). Proving that a termination decision would have been justified is not the same as proving that a termination decision would have been made. *Id.*

The factual record supports Deputy Bisbee's position that Sheriff Bey, Undersheriff Johnson and Sergeant VanBuskirk discharged him for filing the stolen property report. At least three (3) members of the Sheriff's Department – Sergeant Way, Deputy Macormic and the dispatcher – read Bisbee's report and knew of his complaint against VanBuskirk prior to the termination decision. The dispatcher assigned the report an identification number, which appeared in the computerized Daily Bulletin. Sheriff Bey acknowledges that Sergeant Way told him that the Daily Bulletin entry referred to Bisbee's information about the mishandling of found property. Bisbee's reported charges of official misconduct by VanBuskirk were common knowledge and freely discussed among departmental employees. Furthermore, no one in the Sheriff's Department questioned Bisbee or eye witnesses about the encounter with Sergeant VanBuskirk on the

Interstate, belying Petitoners' contention that they dismissed Bisbee in good faith for insubordination.

Petitioners ask this Court to adopt their proffered reasons for terminating Bisbee's employment and then to remand for reconsideration in light of the rule for measurement of damages announced in *McKennon*. Since the Writ of Certiorari does not confer a factfinding function upon this Court, the Petition for the Writ should be denied.

II.

THE TENTH CIRCUIT DECISION REQUIRES PETITIONERS TO PROVE A LAWFUL MOTIVE, CONSISTENT WITH *MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION v. DOYLE*.

Petitioners fault the Tenth Circuit Court of Appeals for refusing to usurp the jury's function to determine whether Petitioners would have discharged Deputy Bisbee even in the absence of his protected conduct. The Tenth Circuit decision comports with the scheme of proof for an alleged mixed-motive case announced by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 273, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977).

Under *Mt. Healthy*, the employee bears the initial burden of showing that his conduct was constitutionally protected, and that this conduct was a substantial or motivating factor in the adverse employment decision. Once the employee has carried that burden, the governmental employer can still prevail if it shows *"by a preponderance of the evidence* that it would have reached the same [employment] decision . . . even in the absence of the

protected conduct." *Id.* 429 U.S. at 287, 97 S. Ct. at 576. (emphasis added).

Petitioners have never shown by a preponderance of the evidence that they would have discharged Bisbee for insubordination, because Petitioners have never presented their case to the factfinder in a trial court. Neither the Tenth Circuit Court of Appeals nor this Court can resolve this question of material fact at the summary judgment stage, as Petitioners request. The defense of qualified immunity does not shield Petitioners from trial litigation in this case involving protected speech and ample evidence of retaliatory discharge.

III.

THE TENTH CIRCUIT'S RECOGNITION OF A MATERIAL FACTUAL DISPUTE IS NOT ERRONEOUS.

Petitioners concede that the United States Supreme Court is not a court for factfinding. *See, Goodman v. Lukens Steel Company,* 482 U.S. 656, 107 S. Ct. 2617, 2623, 96 L.Ed.2d 572 (1987). Nevertheless, Petitioners continue to press in this Court their interpretation of the facts. Petitioners ask this Court to discard, as an impermissible pyramiding of inferences, specific and substantial evidence of Petitioners' knowledge of Bisbee's report of official misconduct and Petitioners' decision to discharge him for this speech.

Petitioners met and agreed to discharge Bisbee on July 15, 1991, under the following surrounding circumstances:

1. Bisbee had delivered his report of VanBuskirk's misconduct to the on-duty supervisor Sergeant Way on July 6, 1991.

2. The on-duty dispatcher read the report and assigned it a case number.

3. The case number was entered in the Daily Bulletin with a reference to "sensitive materials" in Johnson's possession.

4. Sergeant Way read the report and advised Sheriff Bey that same evening or the following morning that Bisbee had filed a report concerning the possible mishandling of found property.

5. Sheriff Bey directed Undersheriff Johnson to investigate the "sensitive materials" entry in the Daily Bulletin on July 10, 1991.

6. At least four members of the Sheriff's Department (Bisbee, Way, Macormic, dispatcher) had read Bisbee's entire report.

7. Bisbee's reported charges of official misconduct by VanBuskirk were common knowledge and freely discussed among departmental employees.

Petitioners summarily terminated Bisbee's employment, based on VanBuskirk's uncorroborated charges, without even minimal inquiry of Bisbee or other witnesses. Retaliation and expediency, more likely than insubordination, motivated Petitioners' employment decision under these circumstances.

The present case presents a classic one for decision by the jury, since it involves a critical factual dispute and since it depends heavily on the credibility of the witnesses. The question of the real reason for Deputy

Bisbee's termination should not be determined by summary judgment. The parties are entitled to a trial on this bona fide factual dispute. *Bushman Construction Company v. Conner,* 307 F.2d 888, 892-893 (10th Cir. 1962).

CONCLUSION

Kenneth Bisbee requests this Court to deny the Petition For Writ Of Certiorari, because this case presents factual issues inappropriate for the Court's review, and because the lower courts' denials of qualified immunity were not in error.

Respectfully submitted,

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